

STATE OF MICHIGAN  
COURT OF APPEALS

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DAVID JOSEPH and ALBERT A. ZERKA,

Plaintiffs-Appellants,

V

GEORGE KILLEEN,

Defendant-Appellee.

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UNPUBLISHED

April 23, 2002

No. 229021

Genesee Circuit Court

LC No. 99-066029-NO

Before: Gage, P.J., and Griffin and Buth\*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Zerka represented plaintiff Joseph in a lawsuit against a client of defendant Killeen. The parties agreed to settle the case for \$50,000, which sum was to be paid from any monies defendant collected in a lawsuit he had pending against the City of Flint. Defendant's client recovered from the city but neglected to pay Joseph. Plaintiffs filed this action, contending that defendant owed them a duty to make sure his client paid the judgment. The trial court disagreed and dismissed the case.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). When reviewing a motion decided under MCR 2.116(C)(8), the Court accepts as true all factual allegations and any reasonable inferences drawn from them in support of the claim. Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery. *Stott v Wayne Co*, 224 Mich App 422, 426; 569 NW2d 633 (1997), aff'd 459 Mich 999 (1999).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party

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\* Circuit judge, sitting on the Court of Appeals by assignment.

fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

A cause of action for negligence requires the plaintiff to prove that the defendant breached a duty owed to the plaintiff. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In a legal malpractice action, that duty arises from the lawyer-client relationship. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Neither plaintiff was a client of defendant, and the law is clear that an attorney does not owe a duty of care to his client's legal adversary. *Friedman v Dozor*, 412 Mich 1, 24-27; 312 NW2d 585 (1981). One exception to this rule is that a testator's attorney owes a narrow duty to the beneficiaries named in a will, by virtue of their third-party beneficiary status, to draft the will in accordance with the testator's intent, *Mieras v DeBona*, 452 Mich 278, 302, 308; 550 NW2d 202 (1996) (Boyle, J.), which is clearly inapplicable here. A third party may also stand in place of an attorney's client if certain conditions are met and sue the attorney for malpractice under the doctrine of equitable subrogation, *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253-255; 571 NW2d 716 (1997), but plaintiffs have not shown or even alleged that they met the necessary conditions. While defendant could theoretically voluntarily assume a duty to ensure that his client paid Joseph, *Zychowski v A J Marshall Co, Inc*, 233 Mich App 229, 231; 590 NW2d 301 (1998), the court determined that neither the judgment nor the statements placed on the record at the time of the settlement supported such a finding and, while plaintiffs continue to maintain otherwise, they have not pointed to any specific language in the record to support their argument. Accordingly, we find that the trial court did not err in granting defendant's motion.

Affirmed.

/s/ Hilda R. Gage  
/s/ Richard Allen Griffin  
/s/ George S. Buth